Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1306

EDWARD G. CASTRO,
Petitioner,

vs.

PEOPLE OF THE TERRITORY OF GUAM,
Respondent,

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Edward G. Castro respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1980.

OPINIONS BELOW

Neither the opinion of the Ninth Circuit nor that of the District Court of Guam is reported. A copy of each is appended hereto. No opinion was rendered by the Superior Court of Guam.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 24, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Has the Ninth Circuit decided the question, whether the trial judge's error in charging the jury that "a lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him" was harmless beyond a reasonable doubt, in a way in conflict with *Fontaine v. California,* 390 U.S. 593 (1968)?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

U. S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

48 U.S.C. § 1421b(u):

> The following provisions of and amendments to the Constitution and the United States are hereby extended to Guam to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any State of the United States: article I, section 9, clauses 2 and 3; article IV, section 1 and section 2, clause 1; the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the Fourteenth amendment; and the fifteenth and nineteenth amendments.
>
> All laws enacted by Congress with respect to Guam and all laws enacted by the territorial legislature of Guam which are inconsistent with the provisions of this subsection are repeealed to the extent of such inconsistency.

STATEMENT OF THE CASE

Castro was charged in the Superior Court of Guam with (1) knowingly and intentionally delivering heroin, (2) knowingly and intentionally possessing heroin with intent to deliver, and (3) conspiring to commit the crime of knowingly and intentionally delivering heroin.[1]

The evidence regarding the second charge (the only one of which Castro was found guilty) at most showed Castro's

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[1]Amended Indictment, Excerpts of Record at 1-2.

mere proximity to heroin, his mere presence on property where heroin was located, or his mere association with a person who controlled heroin:[2]

A. As I was approaching the said vehicle, I observed an individual sitting down on the pole of said building.

Q. Where was this in relation to the defendant's vehicle? How far away was he from the defendant's vehicle?

A. About three feet.

Q. Then what happened?

A. As I got closer to the vehicle, the individual stood up and start walking away from the vehicle, and then stopped, and he just stand by the rail of the said building near the Marine Drive Route 1.

Q. And who was that person?

A. I identified him as Kin Ninete.

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[2]The district court said that "the heroin was found in the area of [Castro's] car shortly after he promised to supply *the heroin* in exchange for $3,000." Opinion, Excerpts of Record at 5 (emphasis added). This is a misstatement of the facts. Castro never promised to supply "heroin": "Q Did you see the defendant again on that day? A Yes, sir. Q Where did you see him at? A The rear of the ITC Building. . . . Q Approximately what time did you meet him? A Approximately 7:10 p.m. Q Where at the ITC Building did you meet him? A In the rear of the parking lot. Q At the time you met him, did you have a conversation with him? A Yes, sir, we did. Q Was anyone present to listen to that conversation? A No, sir. Q What did you say and what did he say? A I asked him if he had *the stuff* with him, he said to me he didn't have *it* with him. Q Then what? A I asked him, 'we made a deal that I have the money, you bring *the stuff*.' . . . I told him that I was instructed by my gang to see *the stuff* before I handed him the money. He then replied, 'Trust me. I have *the stuff*. Give me the money and in five minutes I will be back.' I handed the $3,000 to him and as he walks away from my car, I step on the brakes to give the signal to the agents to move in. Q Is that the same $3000 you had been issued earlier? A Yes, sir. Q That you referred to that you had at the residence that afternoon? A Yes, sir." Transcript at 10-11 (emphasis added). The government is challenged to point out even a single instance in the entire transcript where Castro ever promised to supply "heroin."

Q. Then what did you do, if anything?

A. I approached Kin Ninete and I told him to stay where he's at. When I said that, he mentioned this word, 'Oh shit, this is it' and he was looking so suspicious.[3]

A. I found the suspected heroin next to a concrete post under the—on the parking lot of the GITC.

. . . .

Q. Where was [Castro's car] in relation to where you found some evidence; how far away was it?

A. From the evidence?

Q. Right.

A. Approximately six feet.

. . . .

Q. Will you describe please more specifically the location where you found the evidence . . . at the ITC Building?

A. It was on the east of GITC, first floor.

Q. Where was it in relation to this car that you searched?

A. Okay. The car was parked in the parking lot facing north towards Marine Drive. The evidence was located east about six feet from where the car was parked.

Q. Was there any pole in the area?

A. Yes, sir.

Q. And where was that located?

A. The pole is located six feet east of the car and there was a concrete planter box underneath the concrete support post; inside the concrete is where I found the evidence, the concrete planter box, that is where I found the evidence.

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[3]Transcript at 74.

Q. And this planter box was approximately how far from the car that you searched?

A. About six feet.[4]

A. I asked Mr. Castro who he was with and he told me 'Kin."[5]

Castro did not testify.

At the close of all the evidence Castro moved for judgment of acquittal.[6] The motion was granted as to the third charge, that of conspiring to commit the crime of knowingly and intentionally delivering heroin.[7]

The trial judge instructed the jury that "it is your duty, as jurors, to follow the law as stated by the Court, and you are to apply the rules of law so given."[8] He also instructed the jury that "a lack of testimony on the defendant's part will supply a failure of proof by the People so as to support *by itself* a finding against him."[9]

During their deliberations the jury sent the trial judge the following note:

> "(1)—We, the jury, in the above entitled action, request the following: the quoted definition of [dominion], possession, intent, knowledge, direct and indirect *circumstantial evidence;* (2) will a verdict have to be

[4]Transcript at 96-101. *Compare* this testimony ("the evidence was located about six feet from where the car was parked") *with* Transcript at 11: "[Castro] then said that he have [the stuff] *inside* his car in the building area." (Emphasis added.)

[5]Transcript at 150.

[6]Transcript at 182-83.

[7]Transcript at 186.

[8]Transcript at 187.

[9]Transcript at 193 (emphasis added).

> reached before the jury leaves the courthouse; (3) dictionary."[10]

The jury acquitted Castro of the first charge, that of knowingly and intentionally delivering heroin.[11] On the second charge, that of knowingly and intentionally possessing heroin with intent to deliver, he was found guilty[12] and received a jail sentence of 8 years.[13]

Castro appealed to the District Court of Guam.[14] The jurisdiction of the district court was invoked under 48 U.S.C. § 1424(a). The district court affirmed the judgment of conviction,[15] and the district court's judgment and opinion were in turn affirmed by the Ninth Circuit:

> Appellant also asserts that the trial court incorrectly charged the jury that "a lack of testimony on the defendant's part will supply a failure of proof by the people so as to support by itself a finding against him." The appellant is correct. The charge is erroneous. We conclude, however, that the error was harmless beyond a reasonable doubt because the inference of guilt from silence was *mentioned only once* and was clearly *contradicted* by other portions of the instructions and because there exists evidence sufficient *to justify* a verdict of guilty, independent of any inference derived from appellant's silence.[16]

[10]Transcript at 203 (emphasis added).

[11]Transcript at 209.

[12]*Ibid.*

[13]Judgment, Excerpts of Record at 3.

[14]Notice of Appeal, Excerpts of Record at 10.

[15]Appendix.

[16]Appendix (emphasis added).

REASON FOR GRANTING THE WRIT

THE NINTH CIRCUIT HAS DECIDED THE QUESTION, WHETHER THE TRIAL JUDGE'S ERROR IN CHARGING THE JURY THAT "A LACK OF TESTIMONY ON THE DEFENDANT'S PART WILL SUPPLY A FAILURE OF PROOF BY THE PEOPLE SO AS TO SUPPORT BY ITSELF A FINDING AGAINST HIM" WAS HARMLESS BEYOND A REASONABLE DOUBT, IN A WAY IN CONFLICT WITH *FONTAINE v. CALIFORNIA*, 390 U.S. 593 (1968).

In *Fontaine* "the trial judge had instructed the jury that it could draw adverse inferences from [defendant's] silence":[17]

> "... As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify ..., the jury may take that failure *into consideration* as *tending to indicate* the truth of such evidence and as *indicating* that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the *more probable*."[18]

May take that failure *into consideration*? *Tending to indicate* the truth of such evidence? *Indicating* that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the *more probable*? Tame stuff indeed! In the present case the trial judge

[17]Fontaine v. California, 390 U.S. 593, 595 (1968) (footnote omitted).

[18]*Id.* at n. * (emphasis added). Identical instructions are considered in Anderson v. Nelson, 390 U.S. 523, 524-25 (1968), Chapman v. California, 386 U.S. 18, 19 at n. 2 (1967), and Griffin v. California, 380 U.S. 609, 610 (1965).

instructed the jury that "a lack of testimony on the defendant's part will supply a failure of proof by the People so as to support *by itself* a finding against him."[19] According to this the government need not offer even a scintilla of evidence but can rely completely on a defendant's silence to establish guilt beyond a reasonable doubt! There is simply no comparison between the two instructions. The instruction in the present case is immeasurably more prejudicial.

"The disputed issues at the trial [in *Fontaine*] centered principally upon whether the [defendant] knowingly transfered wax bags of marijuana to the informer."[20] The disputed issues arising out of the only charge of which Castro was found guilty centered principally upon whether he knowingly possessed heroin.[21]

In *Fontaine* "the jury had been asked to convict [defendant] on the basis of *circumstantial evidence*."[22] In the present case the jury was asked to convict Castro on the basis of *circumstantial evidence*. The jury was asked to convict him on the basis of his proximity to heroin, his presence on property where heroin was located, and his association with a person who controlled heroin.[23] During their deliberations the jury in the present case asked the trial judge to repeat his instruction on *circumstantial evidence:*

[19]Transcript at 193 (emphasis added).

[20]Fontaine v. California, 390 U.S. 593, 595 (1968).

[21]Amended Indictment, Excerpts of Record at 1-2.

[22]Fontaine v. California, 390 U.S. 593, 596 (1968) (emphasis added).

[23]Transcript at 74, 96-101, 150.

"(1)—We, the jury, in the above-entitled action, request the following: the quoted definition of [dominion], possession, intent, knowledge, direct and indirect *circumstantial evidence;* (2) will a verdict have to be reached before the jury leaves the courthouse; (3) dictionary."[24]

Castro was charged with (1) knowingly and intentionally delivering heroin, (2) knowingly and intentionally possessing heroin with intent to deliver, and (3) conspiring to commit the crime of knowingly and intentionally delivering heroin.[25] As to the third charge the trial judge had granted Castro's motion for judgment of acquittal.[26] The jury acquitted Castro of the first charge.[27] It was only as to the second charge that the jury found Castro guilty.[28] This Court held in *Fontaine* that "in these circumstances, the State has not met its burden of proving beyond a reasonable doubt that the erroneous . . . instruction *did not contribute* to [defendant's] conviction."[29] The government in the present case has not met its burden of proving beyond a reasonable doubt that the trial judge's erroneous instruction *did not contribute* to Castro's conviction.

The Ninth Circuit gives two reasons for holding that the trial judge's error in charging the jury "was harmless beyond a reasonable doubt."[30] The first reason is "because

[24]Transcript at 203 (emphasis added).
[25]Amended Indictment, Excerpts of Record at 1-2.
[26]Transcript at 186.
[27]Transcript at 209.
[28]*Ibid.*
[29]Fontaine v. California, 390 U.S. 593, 596 (1968) (emphasis added).
[30]Appendix.

the inference of guilt from silence was *mentioned only once* and was clearly *contradicted by other portions of the instructions.*"[31]

Mentioned only once? True enough. But for all practical purposes what the trial judge "mentioned only once" was that the government did not have to offer even a scintilla of evidence but could rely completely on Castro's silence to establish guilt beyond a reasonable doubt!

Contradicted by other portions of the instructions? "A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal."[32] The Ninth Circuit's holding in the present case "really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, [that court] can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them."[33] "Where two instructions are given to the jury, one erroneous and prejudicial, and the other correct, since it is impossible to tell which one the jury followed, it constitutes reversible error."[34]

The Ninth Circuit's second reason is "because there exists evidence sufficient *to justify* a verdict of guilty, independent of any inference from [Castro's] silence."[35]

[31]*Ibid.* (emphasis added).
[32]Bollenbach v. United States, 326 U.S. 607, 613 (1946).
[33]*Id.* at 613-14.
[34]United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950).
[35]Appendix (emphasis added).

This is simply not the test in *Fontaine*. The test in *Fontaine* is not whether the government has met its burden of proving beyond a reasonable doubt that there exists evidence sufficient *to justify* a verdict of guilty, independent of any inference derived from defendant's silence. The test in *Fontaine* is whether the government has "met its burden of proving beyond a reasonable doubt that the erroneous . . . instruction *did not contribute* to [defendant's] conviction."[36] What attempt has the Ninth Circuit made to answer the question whether the government has met its burden of proving beyond a reasonable doubt that the erroneous instruction *did not contribute* to Castro's conviction? None whatever.

"[T]he question of guilt or innocence is a close one."[37] This is "a case in which, absent the constitutionally forbidden [instruction], honest, fair-minded jurors might very well have brought in [one more] not-guilty [verdict]. Under these circumstances, it is completely impossible . . . to say that the [government] has demonstrated, beyond a reasonable doubt, that . . . the trial judge's instruction *did not contribute* to [Castro's conviction]."[38] "In these circumstances, the [government] has not met its burden of proving beyond a reasonable doubt that the erroneous . . . instruction *did not contribute* to [Castro's] conviction."[39]

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[36]Fontaine v. California, 390 U.S. 593, 596 (1968) (emphasis added).

[37]Chapman v. California, 386 U.S. 18, 22 (1967).

[38]*Id.* at 25-26 (emphasis added).

[39]Fontaine v. California, 390 U.S. 593, 596 (1968) (emphasis added).

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated, Agana, Guam,
February 13, 1980.

Respectfully submitted,

HOWARD TRAPP,
Attorney for Petitioner.

(Appendix follows)

APPENDIX

Appendix

United States Court of Appeals
for the Ninth Circuit

No. 79-1589

The People of the Territory of Guam,
Plaintiff-Appellee,

vs.

Edward G. Castro,
Defendant-Appellant.

[Filed Jan. 24, 1980]

MEMORANDUM

Appeal from the Appellate Division
of the District Court of Guam

Before: MERRILL and SNEED, Circuit Judges, and REED, JR.,* District Judge.

Appellant was convicted for possession of heroin with intent to deliver. The appellate court in Guam affirmed. We also affirm.

Appellant asserts his conviction rests on insufficient evidence. The evidence is not in substantial dispute. Viewing it in a light most favorable to the prosecution we conclude that a rational trier of fact could have found the essential elements of the crime for which appellant was

*Honorable Edward C. Reed, Jr., District Judge for the District of Nevada, sitting by designation.

convicted. *See United States v. Bailey*, 607 F.2d 237, 243 (9th Cir. 1979).

Appellant also asserts that the trial court incorrectly charged the jury that "a lack of testimony on the defendant's part will supply a failure of proof by the people so as to support by itself a finding against him." The appellant is correct. The charge is erroneous. We conclude, however, that the error was harmless beyond a reasonable doubt because the inference of guilt from silence was mentioned only once and was clearly contradicted by other portions of the instructions and because there exists evidence sufficient to justify a verdict of guilty, independent of any inference derived from appellant's silence. *See Anderson v. Nelson*, 390 U.S. 523, 524 (1968); *Chapman v. California*, 386 U.S. 18, 24 (1967).

AFFIRMED.

In the District Court of Guam

Appellate Division

Criminal Case No. 78-006A

The People of the Territory of Guam,
Plaintiff-Appellee,
vs.
Edward G. Castro,
Defendant-Appellant.

[Filed July 13, 1979]

OPINION

Before: DUENAS and LAURETA, District Judges, and HEFNER, Designated Judge.

PER CURIAM:

Defendant was convicted of possession of heroin with intent to deliver and was sentenced on February 10, 1978 to serve eight years in prison. On appeal, he argues that there was insufficient evidence to convict him and that certain errors in the instructions to the jury resulted in plain error. In addition, defendant-appellant has made a Motion For Relief Heretofore Available by Mandamus, based on a delay in the preparation of the transcript in the court below.

First, we find that there was substantial evidence to support the jury's verdict. Clearly, the government proved a case of constructive possession where it was shown that the defendant maintained control or a right to control the

contraband. See e.g. *Green v. U.S.*, 282 F.2d 388 (9th Cir. 1960). The heroin was found in the area of defendant's car shortly after he promised to supply the heroin in exchange for $3,000. As stated by the Supreme Court in *Glasser v. U.S.*, "the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." 315 U.S. 60, 80, 62 S.Ct. 457 (1942).

Next, we come to the question of the instructions to the jury. As pointed out by the government, it seems very likely that the error complained of was a typographical error of the court reporter. However, we are bound by the record below which shows that the trial judge stated to the jury that "a lack of testimony no the defendant's part will supply a failure of proof by the People . . ." (TR 193:22).

There is no doubt that this instruction was an error, however, the instructions, when taken as a whole, show this to be harmless error. The instruction immediately following cured the error:

> Remember that *the law does not compel a defendant in a criminal case to take the witness stand and testify;* and no presumption of guilt may be raised and *no inference of any kind may be drawn from the failure of a defendant to testify;* and as stated before by me, that *the law never imposes upon the defendant the duty of calling any witnesses or producing any evidence on his behalf.* Transcript at 193, 194. (Emphasis added).

See also page 188 of the transcript where the jury was told that "the presumption of innocence alone is sufficient to acquit," and page 189: "the law never imposes upon the defendant the duty of calling any witnesses or producing any evidence in his behalf."

No objection was made to the erroneous instruction, and when taken in context it is harmless beyond a reasonable doubt. The jury was clearly told that the government had the burden of proving guilt and that the defendant had no duty to produce evidence or testify. We cannot believe that the jury listened only to the erroneous instruction and disregarded the clear message of the instructions when taken as a whole.

There is no merit to the last issue raised by the appellant. The trial court's instructions to the jury were not inherently misleading and if defendant's counsel felt that they were unclear, he should have made a timely objection. Appellant has not specified how he was prejudiced by the complained of instruction, and we find that the instructions when taken as a whole adequately protected the substantial rights of the accused.

Finally, we must deal with Mandamus Motion filed by the appellant on April 26, 1979. It seems that in early April, the appellant had moved for a judgment of acquittal in the Superior Court, based on *People v. Olsen,* 462 F. Supp. 608 (D.C. Guam, 1978). The Superior Court refused to rule, holding that it was without jurisdiction to hear the Motion for Acquittal because the Notice of Appeal to the District Court divested it of jurisdiction. There has been a large amount of confusion based on the language

in *Olsen,* stating that "this Court will not henceforth entertain any applications for relief based on delay in production of the transcript unless there has previously been made an application for relief in the trial court . . ."

This language should not be construed to mean that a Motion for Acquittal based on transcript delays must be first made in the Superior Court before such relief will be available in the Appellate Division. This language, when taken in context, means that it is up to the appellant to take some steps in the Superior Court to expedite the preparation of the transcript if inordinate delay is resulting. In other words, the Superior Court is better able to supervise its employees and "that shortcomings and delays in the performance of duty by trial court employees should be first called to the attention of the trial court." A Motion for Acquittal, based on *Olsen,* will not be entertained in the Appellate Division, unless the appellant can show that he brought this matter before the Superior Court and that no prompt relief was forthcoming when the Presiding Judge or other Superior Court Judges were made aware of the difficulties in individual transcript preparation.[1]

Accordingly, we must decline to grant the Mandamus Motion of the appellant. We agree with the Superior Court that it was without jurisdiction to hear this matter of acquittal upon filing of a notice of appeal. However, in

[1]It is our considered view that an attempt by an appellant to have the Superior Court insure that its employees prepare the record and transcript within a reasonable amount of time does not interfere with the appellant jurisdiction of the District Court. In other words, this is a ministerial matter which can be properly addressed to the Superior Court, through formal motion, regardless of whether a notice of appeal has been filed (ordinarily divesting it of jurisdiction).

the interest of justice, we have reviewed this matter and find that an eleven month delay in transcript preparation, although not to be condoned, does not reach the degree of harm present in *People v. Olsen, supra.* It seems that the defendant has not been confined during this period and also that to a certain extent the delay in preparation of this appeal was caused by the appellant's own procrastination in hiring new counsel to prosecute his appeal. (See March 8, 1979 Declaration filed by counsel). Even if the transcript had been prepared a few months earlier, it is unlikely that this appeal could have been heard any earlier, coupled with appellant's own requests for extensions of time and the District Court's Appellate calendar.

Based on the above, the conviction of the defendant must stand and his Motion for Mandamus is denied. The appellant is ordered to be taken into custody by the Department of Corrections.

AFFIRMED.

/s/ CRISTOBAL C. DUENAS

/s/ ALFRED LAURETA

/s/ ROBERT A. HEFNER

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BRIEF IN OPPOSITION
to
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BRIEF IN OPPOSITION
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for the Ninth Circuit

REASONS FOR DENYING THE WRIT

THE DECISION OF THE NINTH CIRCUIT IN THIS CASE CORRECTLY APPLIED THE HARMLESS ERROR RULE ANNOUNCED BY THIS COURT IN CHAPMAN V. CALIFORNIA

Although it is a constitutional error for a trial judge to instruct the jury that adverse inferences can be drawn from the defendant's silence, that error is not reversible if it can be determined that the error was harmless beyond

a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Obviously, that determination must be made on a case-by-case basis. In *Fontaine v. California*, 390 U.S. 593 (1968) the state failed to meet this test.

> "The jury had been asked to convict petitioner on the basis of circumstantial evidence, in the absence of testimony from the State's agent who allegedly made purchases from petitioner. *In these circumstances*, the State has not met its burden of proving beyond a reasonable doubt that the erroneous comments and instruction did not contribute to petitioner's conviction."[1]

Fontaine is not this case. Here, during his instructions to the jury the trial judge said

> "Now in deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the People to prove every essential element of the crime charged against him, and a lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such element.
>
> Remember that the law does not compel a defendant in a criminalcase [sic] to take the witness stand and testify; and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify; and as stated before by me, that the law never imposes upon the defendant

[1]*Fontaine v. California*, 390 U.S. 593, 595 (1968) [emphasis added].

> the duty of calling any witnesses or producing any evidence on his behalf."[2]

Earlier in his instructions the judge had told the jury

> "Now the law presumes this defendant, as in every criminal case, to be innocent; that is, he starts of [sic] the trial with a clean slate; that is, with no evidence against him; and the law permits nothing but legal evidence presented before you as jurors to be considered in support of any charges. So the presumption of innocence alone is sufficient to acquit a defendant unless you, as jurors, are satisfied beyond a reasonable doubt of the defendant's guilt after and careful impartial consideration of all the evidence in this case."[3]

Additionally, the jury had previously been told that

> "The burden is always upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt. This burden never shifts from the prosecution to the defendant; forthe [sic] law never imposes upon the defendant duty for calling any witnesses or producing any evidence in his behalf."[4]

At the close of the jury instructions, the petitioner's attorneys and the prosecutor were called to side bar to

[2]Trial transcript at 193-194. Note that the first paragraph was obviously taken from § 261 of CALJIC:

> "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the crime charged against him, and *no* lack of testimony on the defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such element. [emphasis added].

[3]Trial transcript at 188.

[4]Trial transcript at 189.

note objections to the jury charge. Although all three of them had objections to register,[5] no objection was made to the instructions petitioner now assigns as error. While one may hypothesize that the lack of an objection might

[5]"The Court: During a discussion in chambers with both attorneys present, and the government attorney was present, defense counsel stated to the Court that they did not wish the Court to give the less included offense as to charge No. 2; is that correct?

Mr. Terlaje: That is correct, Your Honor.

The Court: Very well. Does the government have any objection as to the instructions given by the Court?

Mr. Vance: Yes, Your Honor, one objection. The defendant is charged jointly on the possession with intent to deliver charge. The Court read exclusive possession to the jury; that they must find the defendant had exclusive possession.

The Court: What was that again? I'm sorry.

Mr. Vance: On the Court's instructions to the jury—

The Court: —on possession?

Mr. Vance: Right.

The Court: Is there an instruction on—

Mr. Vance: He is charged jointly and the Court read exclusive possession; that the government must prove; the government need not prove it is possession as to him. It is charged jointly and that is the evidence.

Mr. Arriola: Your Honor, as a result of Monday's trial—

The Court: I think the Government may be right. There was a portion I may have left out at the end of the possession. You are saying that there was joint possession?

Mr. Vance: Yes, Your Honor.

The Court: I didn't read the latter portion. Is this what you are referring to, the latter portion?

Mr. Vance: Yes, Your Honor.

The Court: You have some objections?

Mr. Arriola: Our objection is this: during our meeting with the—conference with the Judge, I was restricted from confronting the witness about Ninete. Counsel for the government mentioned Ninete's present [sic] there and I was prohibited, and I took the word of the judge in there and I refrained from it.

The Court: It will be noted on the record.

Mr. Terlaje: On our requested jury instruction No. 24, the Court denied our request. We will take exception to that.

The Court: Very well.

(End of side bar conference.)"

Trial transcript at 201-202.

reflect inattention on the part of defense counsel, the content of the discussion at side bar makes that possibility unlikely.

There are only two explanations for the appearance in this record of the above-mentioned misquote of Section 2.61 of CALJIC. Either the court reporter erred, or the judge misread the instruction.

Both the District Court opinion and the Ninth Circuit opinion assumed that the transcript properly reflected what the judge said, but that the error was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18 (1967).

That determination was correct. This record does not show, nor does it provide any reason to infer, that the instruction had an effect upon the jury's verdict. First, the statement of the judge is in conflict with not only the law, but also with the layman's concept of the government's burden of proof. While many pronouncements of a judge might be received by a jury with unquestioned acceptance, this statement is not among them. After all, as noted by petitioner "[a]ccording to this the government need not offer even a scintilla of evidence but can rely completely on a defendant's silence to establish guilt beyond a reasonable doubt!"[6]

Secondly, it is impossible to reconcile the statement now assigned as error with the paragraph that followed in the instructions. It is not possible to think that a jury would apply the erroneous language to the exclusion of the rest

[6]Petitioner's brief at 9.

of the charge, and never ask for clarifying instructions. This argument is particularly cogent in a case where the jury did ask for instructions on other matters.[7]

There is a third reason why it can be said that the jury did not rely on the erroneous part of the instruction. It acquitted Castro of the first charge. It is not reasonable to think that a jury who believed that "a lack of testimony on the defendant's part will . . . support by itself a finding against him" would acquit the defendant on one charge while convicting him on the other.

CONCLUSION

Petitioner argues that it was improper to apply the *Chapman* harmless error rule to the jury instructions in this case. However, an examination of the record shows that the error (if it existed at all) was undoubtedly harmless. The petition should be denied.

Respectfully submitted this 7th day of March, 1980.

Respectfully submitted,

KENNETH E. NORTH
Attorney General
Attorney for Respondent

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[7] "(1) We, the jury, in the above entitled action, request the following: the quoted definition of domain, possession, intent, knowledge, direct and indirect circumstantial evidence; (2) will a verdict have to be reached before the jury leaves the courthouse; (3) dictionary." Trial transcript at 203.